CORE
Metadata, citation and similar papers at core.ac.uk
Provided by Columbia Law School: Scholarship Repository

Columbia Law School
Scholarship Archive

Faculty Scholarship
Faculty Publications

2007

Why Not a Miranda for Searches?

Gerard E. Lynch
Columbia Law School, glynch@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

 Part of the Constitutional Law Commons, Criminal Law Commons, and the Criminal Procedure Commons

Recommended Citation

Gerard E. Lynch, *Why Not a Miranda for Searches?*, 5 OHIO ST. J. CRIM. L. 233 (2007).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2157

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact cls2184@columbia.edu.

Why Not a *Miranda* for Searches?

Gerard E. Lynch*

I am delighted to be here today.

I am delighted to be at The Ohio State University, which has not only built a truly extraordinary criminal law and procedure faculty, including Professor Joshua Dressler, Alan Michaels, Sharon Davies, and Douglas Berman, but has also accumulated a large number of alumni of my home institution, Columbia Law School, including my former students, Professor Edward Foley and the aforesaid Professors Davies and Michaels, as well as Professor Deborah Jones Merritt, who is quite literally a daughter of Columbia, where her father is a distinguished emeritus member of the faculty, my esteemed senior colleague and my own teacher.

And I am delighted to be here sharing a dais with some of the most distinguished senior figures in criminal procedure, starting with the great Yale Kamisar, who largely invented the field of constitutional criminal procedure and has been characterized as the father of the *Miranda*[1] decision we are here to discuss, and including Ronald Allen, one of the most distinguished critics of that decision, and George Thomas, who knows as much about the empirical and philosophical bases of *Miranda* as anyone in my generation.

So it is a deep pleasure to be here.

But it is also somewhat intimidating. What can I say about *Miranda* in the presence of such a distinguished group of people, many of whom have studied this subject far more deeply than I? My main teaching and scholarly activities have concerned substantive criminal law and the courtroom aspects of criminal procedure, as opposed to questions of police investigation.

Lacking a scholarly grounding in this field, is there anything that I can contribute from the different perspective of a judicial officer, charged with the daily task of administering some of these constitutional rules? For the most part, I am wary of any claim that judges know what "really" goes on in a way inaccessible to academics. A judge's perspective is partial, in any number of ways.

---

* United States District Judge, Southern District of New York; Paul J. Kellner Professor of Law, Columbia University School of Law.

This paper was originally delivered at a symposium marking the fortieth anniversary of the *Miranda* decision, held at The Ohio State University Moritz College of Law on October 6, 2006, and retains the informality of the format for which it was created. I am grateful to Dean Nancy Rogers, Professor Marc Spindelman, who organized this event, my good friends and former students Professors Alan Michaels, Sharon Davies, and Ned Foley, to whom I no doubt owe the invitation, and the other participants in the panel, for the opportunity to participate in this event, especially Professor Yale Kamisar, whose work has benefited not only generations of criminal procedure scholars, but also the cause of fairness and liberty in this country.

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

First, I sit in a very specific court: a federal trial court in New York. There is reason to believe that federal agents are more aware of the niceties of constitutional rules than local police, and I see mostly federal cases. Second, the prosecutors and defense lawyers in my court are extremely qualified, and while their workloads are heavy, they are not so overburdened as to lack the time to vigorously investigate and litigate questions of compliance with constitutional mandates. If there is a practical deterrent effect to exclusionary rules, that effect must be greater where there is a greater likelihood that violations will be brought to the court's attention. Third, even as to the state court cases that come before me on habeas corpus, my caseload may not reflect that of the country as a whole. The New York courts—at least those within the jurisdiction of my district—are, on the whole, more liberal than their federal counterparts, so my habeas docket is not devoted to correcting abuses in the state court. Any observations I may make about what really happens are not remotely the equivalent of an empirical study that looks to a broader sample than what I see.

Moreover, I am not overly sanguine about the ability of judges to know what actually happens in police stations and on back roads at night. I frequently have to find the facts of police-citizen encounters. This is a difficult task, and in any given case the preponderance of evidence test favors belief in the police versions of these transactions. But even if the police version were more than fifty percent likely to be true in *every* case, it is not one-hundred percent sure to be true in almost *any* case, and the aggregate number of errors in our fact-findings must necessarily be significant. I don't know that scholars can penetrate these mysteries, either, but the broader perspective that comes from systematically surveying large numbers of police officers and defendants may give a more realistic view of that process than judges have.

But judges do know what happens in courtrooms. And that is relevant to assessing the utility of at least some criminal procedure rules. It also provides a certain human perspective on matters that otherwise may seem academically theoretical, or statistically cold.

What I would like to do is to share some thoughts about a paradox that must occur to any judge familiar with the extensive *Miranda* literature. It is a firmly established aspect of the *Miranda* story that the decision was the product, in part, of judicial frustration with the difficulty of applying a "totality of the circumstances" test for determining the voluntariness of confessions. Professor Kamisar's paper reminds us of this conclusion.[2] We are told that the *Miranda* standard is much easier to apply, and has ushered in a period in which the admissibility of confessions is easily determined. And yet, parallel to this story, there is another that academics discussing *Miranda* rarely mention: in dealing with searches and seizures allegedly the product of the freely-given consent of the suspect, courts to this day apply exactly the same test of the voluntariness of the consent, as determined from the totality of the circumstances, that supposedly proved impossible and unwieldy as a measure of the admissibility of confessions. The Fourth Amendment's requirements of a warrant and

---

[2] Yale Kamisar, *On the Fortieth Anniversary of the* Miranda *Case: Why We Needed It, How We Got It—and What Happened to It*, 5 OHIO ST. J. CRIM. L. 163 (2007).

probable cause, unlike the Fifth Amendment's right against self-incrimination, are not buttressed by a requirement that suspects asked to waive those rights be informed of their existence, let alone of their right to consult a lawyer before doing so.[3]

This disparity is quite glaring from the perspective of a working trial judge. It isn't quite true that *Miranda* obviates any issue with respect to the admissibility of confessions. Defendants make *Miranda* motions with some frequency, sometimes arguing that they were not warned, sometimes contending that they were questioned while in custody at a point when the authorities say that they were still free to go, engaged in a voluntary chat with the police, before their admissions created probable cause and led to a formal arrest. And it's notable that these cases sometimes involve questions quite similar to those of the dreaded voluntariness inquiry: *Miranda* does not formally preclude a challenge to the voluntariness of a waiver given after warning (although such claims are extremely difficult in the face of the strong presumptive value of the warnings), and asking whether a reasonable person would have felt constrained not to leave by the coercive effect of police behavior (the very question that determines whether interrogation is custodial and thus must be preceded by *Miranda* warnings) is not very different from asking whether subtle coercion rendered a confession involuntary. But for the most part, efforts to suppress confessions are governed, as a practical matter, by the simple rule that if the police gave warnings, the confession comes in, and if they did not, it goes out.

Consent searches, however, are a different matter. They are a very frequent feature of cases involving physical evidence. Next to the pervasive automobile exception to the warrant requirement, consent is probably the leading justification offered for warrantless searches, and consent is unquestionably the leading rationale for searches undertaken without particularized probable cause or reasonable suspicion. Often these consents are given by people unquestionably in police custody, and even when they are not, they often occur under circumstances in which a claim of coercive conduct is quite plausible. As with confessions, it is remarkable how often, in the police account, people with everything to hide and a constitutional right to hide it nevertheless give it up freely to the police.

Just as the commentators on *Miranda* would predict, then, I have little occasion to address the voluntariness of confessions. If *Miranda* was intended to take courts out of the business of deciding the voluntariness of confessions case by case, on a "totality of the circumstances" test, it has been a spectacular success. However, if my experience is any indication, the courts have been taken out of that business only to have to occupy themselves regularly with a virtually identical inquiry: we must continually address the voluntariness of consents to police searches, on the unique facts of each individual case, using precisely the same "totality of the circumstances" test that we are told had proven hopelessly inadequate as applied to assessing the voluntariness of confessions. Hence the question that gives the title of this paper, "Why is there not a *Miranda*-type rule that invalidates consents to search unless the

---

[3] *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

party whose consent is sought is first advised that he or she has a constitutional right to refuse such consent?"

Let me further refine what I mean by that question. First, it should not be interpreted as a rhetorical question. I do not mean to suggest that it is somehow self-evident that the same rules should apply in the context of searches as in that of confessions. I ask the question not to make a rhetorical point, but out of genuine interest in why the rules have developed differently. Second, I do not primarily mean to ask a normative question about whether there *should* be a requirement of *Miranda*-type warnings as a prerequisite to a finding of consent justifying a warrantless or probable cause-less search (although I may make a few normative arguments or suggestions along the way). The question I am interested in here is quite literally how it happened that, in light of the conventional understanding of why *Miranda* came to be decided, similar pressures did not create a similar rule in the Fourth Amendment context.

I.

Let's explore the paradox a bit more. In 1966, when *Miranda* was decided, the Supreme Court had been grappling with the practice of coerced confessions for over thirty years.[4] As Professor Kamisar describes, the Court had confronted any number of cases, often racially-charged cases from Southern states, in which suspects had been subjected to brutal interrogations that had produced confessions of shameful provenance and dubious reliability. In case after case, the Court had to deal with the same problematic questions: did the defendant confess voluntarily of his own free will, presumably because he really was guilty, or was he compelled to incriminate himself by excessively coercive tactics likely to produce confessions at best repellent, and at worst false?

This continual attention to the voluntariness of confessions is said to have generated substantial pressure on the Court. The Court faced formidable practical difficulties in evaluating the often conflicting stories of defendants and police officials, understanding the varying temperaments of diverse defendants with greater or lesser susceptibility to pressure, and deciding whether the pressures of the police tactics overbore the will of the defendant. In addition to the practical difficulties of policing a voluntariness test, there were philosophical complexities: What did it mean to proclaim that confessions had to be the product of free will? Even without delving into the murk of determinist philosophies, even assuming that there is such a thing as a freely-chosen, autonomous action, confessions to the police seemed an odd place to look for such choices. Occasionally, offenders with burdened consciences betake themselves to police stations on their own initiative seeking to unburden themselves, but such truly voluntary confessors do not occupy much court time. Whether their confessions are the product of free will can be left to the philosophers, but whatever

[4] The era of the Court's involvement with these issues is conventionally understood to have begun with *Brown v. Mississippi*, 297 U.S. 278 (1936).

compulsions arguably produced their admissions were internal, and not the product of police action. Those whose consciences fail to activate until after a few hours of police interrogation can fairly be said to have responded to police pressure; the only question is whether the pressure was so great, or was produced by tactics so abhorrent, that we will classify the confession as coerced.

But all of these difficulties equally attend Fourth Amendment consent. The same detailed reconstruction of the exact words, gestures, postures, and tones of voice of the participants, the same calibration of inducements and threats, and the same inquiry into the mental capacities, personality traits, degrees of experience with police confrontations, and physiological state of the suspect, as attended the voluntariness inquiry with respect to confessions, is necessary in weighing the totality of the circumstances surrounding a purported consent to search. The philosophical difficulties attending the purported exercise of free will do not evaporate when the choice in question is consent to search rather than confession in response to interrogation. If anything, consents to search that are truly free would seem rarer than spontaneous confession: confession is said to be good for the soul, but the same has not been said about permitting the police to rummage through one's possessions. If the same unburdening impulse is at work in consent searches as sometimes produces stationhouse confessions, one would expect to hear of suspects responding to police requests for consent to search by leading the officers to the contraband rather than simply by acquiescing in a search; the psychological benefits would be greater, and the suspect's other possessions unmolested. But that does not seem to be what occurs.

In short, with searches, as with confessions, nearly all consents to police demands (and all of those that become the subject of suppression motions) would seem to be equally voluntary, in the sense of being the product of conscious choice between (possibly unpleasant) alternatives, and equally involuntary, in the sense of being responsive to subtle or gross police pressure rather than spontaneous self-generated action on the part of the suspect. The effort to understand the importance of the pressure in generating the assent seems equally fraught in both cases. Yet in the Fifth Amendment context, these difficulties are said to have produced a judicial need for a simple, easily enforceable prophylactic rule requiring a single factual inquiry, while in the Fourth Amendment context, the courts must still conduct open-ended inquiries into the detailed circumstances of particular police-citizen encounters in order to assess voluntariness.

So why haven't the courts rebelled under the pressure of having to make those assessments? Indeed, the puzzle is even deeper: *Miranda* itself, after all, was a difficult, controversial, innovative decision, an unprecedented effort to "legislate" rules of police conduct. By the time the consent search issue reached the Court, the *Miranda* rule was already available as an "off the rack" solution to problems of police pressure and voluntary submission, yet the Court failed to apply it.

II.

If the *only* question before the house was, why didn't the Court apply *Miranda* to consent searches in 1973, the answer might seem to be a simple, even simplistic, historical and political one. The political atmosphere, and the composition of the Court, changed dramatically between *Miranda* in 1966 and *Schneckloth* in 1973, in part as a direct result of the Warren Court's criminal procedure decisions. *Miranda* was decided at the height of the Warren Court's power. Controversial as the Court's decisions were, and as divided as the Court was in *Miranda*, the decision came at a time when liberalism, though challenged, was politically dominant: Lyndon Johnson had decisively beaten Barry Goldwater in the 1964 presidential election, and had used his mandate to pressure Congress to enact sweeping civil rights laws and to announce a war on poverty. Although *Miranda* was decided by a narrow 5-4 majority, that majority seemed secure.

But the election of 1968, in which the liberal criminal procedure and civil rights decisions of the Warren Court were made a political issue both by the successful Republican candidate, Richard Nixon, and the renegade Southern Democrat, George Wallace, who ran as an independent, produced a decisive change. President Johnson's failed effort to secure his Supreme Court legacy by appointing his friend, Justice Abe Fortas, to succeed Chief Justice Warren collapsed into Fortas's resignation, leaving President Nixon with an immediate opportunity to reshape the Court by replacing Warren and Fortas with conservatives. Before long, the retirements and deaths of Justices Harlan and Black gave Nixon two more seats to fill. All four Nixon appointees were in the *Schneckloth* majority, along with *Miranda* dissenters Stewart and White. The three remaining members of the *Miranda* majority (Justices Douglas, Brennan and Marshall) all dissented. If *Miranda* and *Schneckloth* are intellectually inconsistent, at least no individual member of the Court can be said to have supported irreconcilable positions in the two cases.

The Court as an institution, moreover, made little attempt to reconcile the cases. Ignoring *Miranda*'s insistence that the Court's attempt to apply a voluntariness standard had proven disastrously impractical, the Court blandly noted that the relatively new problem of voluntary consent searches (new to the Court because the application of the exclusionary rule to the states in *Mapp*,[5] had brought to the Court a larger number and wider range of Fourth Amendment problems than it had previously addressed) did not require innovative thinking—the Court had long experience in deciding when a suspect's acquiescence to law enforcement demands was voluntary: the Court had established that standard in *Brown*,[6] and had long familiarity with its rules.[7] *Miranda* was disposed of quickly as a case that dealt with custodial interrogation, a situation not present in *Schneckloth*.[8]

---

[5] Mapp v. Ohio, 367 U.S. 643 (1961).

[6] *Brown*, 297 U.S. at 286.

[7] *Schneckloth*, 412 U.S. at 223–24.

[8] *Id.* at 246–47.

The inconsistencies are glaring, of course. The *Brown* standard of voluntariness, derided as impossible to administer in *Miranda*, is blithely adopted in the Fourth Amendment context in *Schneckloth*. The "inherent coercion" that the Court worried about in *Miranda* is barely recognized in *Schneckloth*: after all, even if the consent in *Schneckloth* was not extracted in a police station, Fourth Amendment consents are often given during custodial interrogations, in police stations and elsewhere. A Court that showed itself so sophisticated about the practical aspects of police interrogation tactics in *Miranda* could hardly miss the reality that the police would be equally skilled in extracting consents to search.

But the political winds and the Court's composition had changed, and a concern for reinforcing police authority in the face of a growing crime wave had replaced a concern about police abuses of that authority.

III.

But if *Schneckloth* itself is easy to account for, its survival is less so, at least if the conventional explanation for *Miranda* holds water. The Court, that conventional wisdom holds, was virtually driven to the *Miranda* solution by thirty years of frustration with the insufficiency of the voluntariness standard. The Court had struggled with that standard in some thirty cases between *Brown* in 1936 and *Escobedo*[9] in 1964,[10] and pronounced the struggle hopeless. Surely the same result would follow with *Schneckloth*. If the courts could not adequately administer a voluntariness standard for confessions, neither could they manage using the same standard for searches.

Yet, *Schneckloth* is older today than *Brown* was when *Miranda* was decided, and it remains good law. Why haven't the courts risen up in dismay, seeking to replace the burdensome and difficult inquiries into the minds of suspects who consent to searches with the simple question "were they warned?" that governs the consent to confess?

At the outset, it's worth noting that "the courts" aren't really consulted in the matter. It wasn't "the courts" that rebelled at determining the voluntariness of confessions, it was the Supreme Court that rebelled at the burden of *reviewing* those determinations. And of course, the Supreme Court's decision to review voluntariness determinations on a case-by-case basis is more purely voluntary than *any* confession or consent to search. Unlike the trial courts, the Supreme Court doesn't have to

---

[9] Escobedo v. Illinois, 378 U.S. 478 (1964).

[10] The statistic is Justice Harlan's. *See* Miranda v. Ariziona, 384 U.S. 436, 507 n.3 (1966) (Harlan, J., dissenting).

decide these issues if it doesn't want to; through the certiorari process, it freely *chooses* to do so.[11]

And the justices simply haven't chosen to engage in such review in the three decades since *Schneckloth*. The justices don't weigh and balance the facts of large numbers of consent-to-search cases; they hardly review *any*, and when they do it is mostly to address particular legal questions, and not to engage in in-depth factual review. Moreover, there seems to be no external demand for them to do so.

Are there differences between the confession and search contexts that explain the difference in Supreme Court approach? I am going to suggest that there are several. I put these differences forward not to make a normative argument in favor of the distinction, although some may find that some of the differences suggest such a normative argument, but rather as an effort to understand the difference in practice. My ultimate thesis is that *Miranda* was not the product of inevitable judicial frustration, but of affirmative policy choice in a particular historical context.

IV.

First, coerced confessions are widely understood, and were understood at the time of *Miranda*, to pose a risk not merely of unethical state behavior, but also of unjust convictions. As we have recently been reminded in the debate over torture and abusive interrogation tactics utilized against supposed terrorist suspects held outside the United States, compelled confessions may be not just distasteful but inaccurate. As cases like New York's Central Park jogger case have recalled, this unreliability can be produced not only by overt torture, but even by much milder pressure tactics of the sort that concerned the Court in *Miranda*.[12]

---

[11] A habeas corpus sophisticate might point out that the Court was somewhat constrained to review voluntary confession cases during the era of *Brown*, because at that time the Supreme Court was the principal avenue of review of the consistency of state court criminal procedure decisions with federal constitutional standards. It was the Warren Court that, in addition to radically expanding the content of those standards, shifted much of the burden of enforcing them to the lower federal courts by expanding the scope of federal habeas corpus. Thus, if *any* federal court would face the burden of reviewing the vast number of confession cases percolating through the state courts every year, it would be the Supreme Court. But of course, the availability of habeas review as an alternative procedure for remedying dubious state court voluntariness determinations cannot account for the dearth of Supreme Court confrontations with Fourth Amendment voluntariness: *Schneckloth* was shortly followed by *Stone v. Powell*, 428 U.S. 465 (1976), which effectively foreclosed federal habeas review of state court search-and-seizure decisions. Thus, the exact phenomenon of vast numbers of state voluntariness decisions that can only be ultimately reviewed for federal constitutional correctness by the Supreme Court that faced the Court during the period between *Brown* and *Miranda* has faced the Court in the Fourth Amendment context for essentially the same duration since *Schneckloth* and *Stone*.

[12] The "Central Park jogger" was a young investment banker who was brutally raped and beaten while running in Central Park. The police quickly "solved" the case by apprehending a group of black teenagers who had been suspected of committing other, lesser crimes in the Park that night, all of whom soon confessed to having committed the horrendous assault, and were duly convicted, despite arguing at trial that the confessions had been false and involuntary (despite *Miranda* warnings). Years later, another man—an adult with a history of violent crimes then serving a long sentence for some of those acts—confessed that he, and not the young men charged, had committed the crime. The resulting

In contrast, the evidence obtained in a coerced "consent" search is generally physical evidence that is highly probative and intrinsically reliable.[13] If the guns or drugs are there, they are probative of the suspect's guilt regardless of whether the consent to search was freely given.

The Supreme Court's experience with assessing putatively voluntary confessions is in large part a history of confessions widely believed to be of dubious validity, often obtained in racially charged cases (just as, indeed, the Warren Court's criminal procedure decisions generally are closely linked to its equal protection decisions). If the Court believed that a black defendant was wrongfully convicted in a Southern state court, it could not review the jury finding that the confession was accurate, but an inquiry into voluntariness provided an alternative way to overturn perceived unjust or racist convictions.

No such motive drives an inquiry into consent searches. As noted, absent a suspicion of police planting of phony evidence, the search cases may suggest police abuse or a suspect's ignorance of his rights (or fear to assert them), but they do not suggest erroneous convictions. Moreover, the system of legally-sanctioned apartheid and overt oppression that the Court confronted in the period from *Brown* to *Miranda* is past. If racial disparity continues to pervade the nation's criminal justice system, the conservative justices who have dominated the Court from *Schneckloth* to the present unquestionably do not perceive that disparity as a reason for judicial activism in criminal justice matters.[14]

Second, the stationhouse interrogation is the home of the third degree. Most custodial interrogations, as the Supreme Court noted in *Miranda*, take place on the home turf of the police, away from any civilian witnesses and under the unmonitored control of law enforcement officials. Abuse thrives in situations of uncontrolled power, and the Court had before it repeated instances of that abuse.

---

reexamination of the cases by the Manhattan District Attorney led to vacation of the original convictions of the young men. *See* Robert D. McFadden & Susan Saulny, *13 Years Later, Official Reversal in Jogger Attack*, N.Y. TIMES, Dec. 6, 2002, at A1; Susan Saulny, *Convictions and Charges Voided in '89 Central Park Jogger Attack*, N.Y. TIMES, Dec. 20, 2002, at A1; Kevin Flynn & Jim Dwyer, *A Crime Revisited: Prosecutors in a Reversal*, N.Y. TIMES, Dec. 6, 2002, at B4.

[13] It is theoretically possible that the evidence "found" in a search was actually planted by the police. Presumably, such deliberately perjurous framing of innocent suspects is rare. But more importantly for our analysis, regardless of how rare or common such egregious misconduct might be, it is largely irrelevant to the debate over consent. Officers so corrupt as to plant false evidence don't need to extract dubious consents to search—they can as easily lie about the consent, or swear to non-existent probable cause. The question of whether a verbal consent was in fact voluntary would be unlikely to arise in such cases.

[14] The connection between racial inequality and criminal justice has been pushed aside by the Court even when it has surfaced overtly in its cases, most famously in *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting an argument that the death penalty was unconstitutional where a study showed that the death penalty was more likely when the homicide victim was white), and less famously in *United States v. Armstrong*, 517 U.S. 456 (1996) (refusing discovery into the alleged race-based exercise of discretion to prosecute crack distribution cases federally, resulting in higher penalties).

Consent searches, in contrast, are less frequently the product of extended pressure in police headquarters (though consents to search are sometimes extracted during custodial interrogations at the station).[15] This is not to say that the police are not typically in full control of the situation when consent to search is sought. The person from whom consent is sought, or one of his or her relatives, friends or associates, may be under arrest; his or her car might have been stopped on the highway for a traffic infraction. There may be many police around; the traffic stop may have taken place in the dark, on an isolated highway. Fear may be in the air.

But the most common consent-to-search scenarios nevertheless take place at or near the premises or property to be searched, rather than in the police station. Often the request to search is made in the person's own home. Consent to search vehicles is most commonly sought on the streets or highways.[16] Quite often other civilians are present, including the suspect's friends or family members, or at least the possibility exists that other civilians may witness what occurs. Moreover, in such situations, whatever pressures are brought to bear to obtain consent must take effect on the spot, in a brief window of opportunity. The police do not typically have the luxury of extended dialogue or interrogation.[17]

The Court may well believe that abusive conduct is less common in these circumstances. And it is almost certainly true that the kind of extreme abuse that marred interrogation practices in the day of the third degree are unlikely in the typical consent-to-search scenario. In my own experience with such cases, I have never heard a defendant claim to have been subjected to physical abuse or to have been without food, water, or contact with others for extended periods. The typical claim is that the police "request" to "look around" was more of an order, conveyed with an air of physical intimidation or under color of legal authority, rather than a true request for

---

[15] It is an interesting sign of the Court's lack of interest in consent searches that while the Court in *Schneckloth* specifically reserved the question whether warnings would be required before seeking consent to search in a custodial setting, Schneckloth v. Bustamonte, 412 U.S. 218, 240 n.29, 247 n.36 (1973), the Court has never found itself obliged to answer that question explicitly—although there was never much doubt how the Court would answer it, and any lingering question was probably put to rest in *Ohio v. Robinette*, 519 U.S. 33 (1996) (holding that a suspect detained by a traffic stop did not need to be told that he was no longer in custody before consent-to-search was requested).

[16] The Court mentioned this factor in *Schneckloth*, contending (with notable exaggeration) that the situations in which consent to search is typically sought are "immeasurably far removed" from the custodial interrogation at issue in *Miranda*. *Schneckloth*, 412 U.S. at 232.

[17] I do not mean to suggest that such circumstances are the invariable context of consents-to-search. As noted above, some consents are extracted *during* custodial interrogation, including interrogation at a police station. Moreover, consents can cascade on consents, creating the kind of extended interrogation that occurs during custodial arrests. A suspect may consent to answer "a few questions," thus extending a vehicle stop; he may consent to "come with us to a more convenient location" for a more extended chat; he may consent to the transfer of his vehicle from the side of the road to some other place where it will be "safer"; he may then consent to remain with the police for an extended discussion, or even to visit other places that the police would like to ask him about, all before being asked to consent to search the vehicle. At each of these steps, the prosecution will contend, a "reasonable person" would have understood that he was at all times free to leave, and of course the consent to search is contended to be a "voluntary" one.

consent.

Third, the Court does not confront a legacy of abusive consent searches, in the same way that it faced a history of abusive interrogations. The *Miranda* Court could point to a history of third-degree tactics documented as early as the Wickersham Report in the 1930s. But the past thirty years have not been notable for such widespread police abuses, still less for violent abuse of the consent search. At the time of *Schneckloth*, there was almost certainly no extensive history of coerced consents to search. This is so not only because of the factors noted above that may make such coercion less likely, but also because state and local police had little incentive to seek, let alone to coerce, a suspect's consent to search before the Warren Court. It was only with *Mapp*, and the application of the exclusionary rule to the states, that police needed to worry very much about justifying their searches and seizures in court. Unlike the case with confessions, to the extent that the police abused the Fourth Amendment in what we might now consider the bad old days, putatively consensual cooperation by the accused was not the principal vehicle of such abuse. A confession (unless it is simply a police invention) requires voluntary participation by the accused, but the police can search without such cooperation. It is only when doctrinal justification for a warrantless search needs to be provided that consent searches became a major weapon in the police arsenal.

In the generation since *Schneckloth*, such extreme abuse is even less likely. The police, in part thanks to increased professionalism brought about by the Warren Court's criminal procedure decisions, are surely more trustworthy than they were in the generation during which the Supreme Court felt compelled to review confession cases. And whether they are or not, they are in fact more trusted by judges elected or appointed in an era in which the dominant political views favor law-and-order over civil liberties. The case-by-case review of confessions leading up to *Miranda* no doubt created considerable political tension for the Court: the Court was frequently reversing convictions, freeing defendants charged with serious crimes, and suppressing evidence that appeared to point to the suspect's guilt. In the post-*Schneckloth* era, the lower courts much more frequently have found voluntary consent than they have overturned consent.

One might hope that this is because there is less police abuse. But whatever the reason for the general judicial acceptance of the police account of consent searches, the consequence of that acceptance is certainly that courts less frequently attract hostile attention for throwing out probative evidence by discrediting police testimony and freeing guilty defendants. And this suggests a fourth distinction between the situation confronting the *Miranda* Court and the post-*Schneckloth* experience with consent searches. While *Miranda* created an immediate furor among police and prosecutors, in the long run it has been accepted by the police and by society, in large part because *Miranda* provided a vehicle for ending, or at least limiting, police-judicial conflict by providing police with a simple rule to follow—a rule that has resulted in more widespread judicial approval of confessions, without significantly reducing the utility of interrogation and confessions in law enforcement.

No such vehicle for conflict reduction has been necessary with respect to consent

searches. A more compliant judiciary has been unwilling to police consent searches as aggressively as the pre-*Miranda* Supreme Court attempted to police confessions. A more conservative Supreme Court has not felt the need to review decisions accepting consents as voluntary. The result is that the voluntariness standard, while every bit as complex, case-specific, and hard to administer in the context of searches as in interrogations, has not produced political tension for the courts, nor uncovered abuses that the judiciary feels required to amend. We have thus learned to live quite contentedly with the voluntariness test.

V.

This last point brings us back to *Miranda* itself, and to its significance in recent American history. *Miranda* did generate a huge political outcry, with exaggerated arguments that the Court was either endangering public safety by encouraging criminals and handcuffing the police, or saving civil liberty from police tyranny. The public outcry led to calls for the impeachment of Chief Justice Warren, and to an attempted congressional overruling of the decision that was largely ignored for a generation until it was held unconstitutional in *Dickerson* in 2000.[18]

It is not only politicians and the lay public who often see the law in such crude terms. Academics and judges too sometimes see law as a more precise instrument than it really is. An academic industry has been built on the attempt to answer such questions as: Has *Miranda* reduced the incidence of confessions or not; and if it has not, does that show the decision to be a paper tiger, a sham protection that really serves to validate police coercion?

These are legitimate questions, but I think they imply a view of law that asks more than judges and constitutional provisions can deliver. No judicial decision can solve a problem like police interrogation for us. The calibration of degrees of coercion, and the precise balance to be struck between getting information and respecting autonomy and preventing police abuse is not, in the end, a task for judges—not because judges aren't suited to seeking the right balance, but because legal rules alone cannot police what happens in the multitude of police-citizen encounters. Fine-tuning the rules, whether of interrogation or of search and seizure, whether under a rubric of voluntariness or under a prophylactic formula, will not ensure compliance with the rules, or adequately control the subtleties of the occasion.

Whatever rules the courts announce, police will adapt their tactics to do what they really need to do to keep order and solve crimes. The resulting patterns of behavior are not the product of unilateral judicial decree, but instead represent an equilibrium that is the product of dynamic, dialectical development of police practice in light of judicial attitudes. I would submit that *Miranda* has survived because it helped create a stable new equilibrium, in which confessions and interrogation continue to be major factors in law enforcement, but in which extreme abuse is less common than it was. This is no small accomplishment. It is not the function of a

---

[18] *See* Dickerson v. United States, 530 U.S. 428 (2000).

particular formulation of a rule, but of a civilizing pressure brought to bear on a volatile situation. It is not a bad thing that suspects continue to confess. It *is* a bad thing that some suspects confess falsely because of successful, and perhaps sometimes overbearing, interrogation techniques, but we have limited tools available for controlling these techniques. I doubt that either the police or the most expert psychologists can devise an interrogation technique that will succeed in persuading a reluctant criminal to admit his wrongdoing, but that will not be equally persuasive to the innocent suspect.

But we can do things that reduce the temptation to abuse. It is not a bad thing, and it is not a small thing, that the first words a person about to be subjected to interrogation hears are, "You have a right . . . ."

I believe it would be an equally good thing if similar words accompanied police requests for consent to search. (I express no view on whether such a warning should be held to be a constitutional right.) Such a rule, like its *Miranda* parallel in custodial interrogation, would probably reduce the number of consents obtained, but most likely not by much. Perhaps such a rule is not necessary because of *Miranda* itself and the other decisions of the Warren Court, decisions that of course have no direct bearing on consent searches. Law operates in a way that is both cruder and more subtle than any effort to accomplish particular narrow results with specific rules. The overall education of both the police and the public in constitutional law that was conducted by the Warren Court resulted in lasting changes in police practice and public awareness. As the Court noted in *Dickerson*, public awareness of the *Miranda* warnings, spread through public media such as television and movie crime dramas, has become a part of the fabric of American life and understanding.[19] Surely that understanding is deeper and broader than the particular contours of the *Miranda* holding, or the particular rules that have been elaborated over the years for its application.

Whether the failure to adopt a similar rule in the context of consent searches is a glaring intellectual inconsistency or a recognition of factors that sufficiently distinguish the two contexts is less significant than the overall fact that the Court emphasized the importance of individual rights and control of police abuse for an extended period of time, across a variety of contexts, in a way that changed the overall practice of criminal justice in a positive direction, and then drew back, across an equally broad front, when political forces told it that it had done enough. *Miranda* is the most potent symbol of that effort; *Schneckloth* is merely one of a number of cases that formed part of its end.

But in any event, the Warren Court was not forced to the *Miranda* solution by some inexorable pressure of the legal, philosophical or administrative inadequacy of the concept of voluntariness. It chose to impose that solution, and its doing so had a resonance that reverberates to this day. That is something that is worth celebrating on the occasion of *Miranda*'s fortieth anniversary.

---

[19] The Court noted in *Dickerson* that the *Miranda* warnings "have become part of our national culture." 530 U.S. at 443.